



In the Matter of:

MICHAEL J. STOUT,

ARB CASE NO. 00-017

COMPLAINANT,

ALJ CASE NO. 1999-STA-42

v.

DATE: January 31, 2003

YELLOW FREIGHT SYSTEM, INC.,

RESPONDENTS.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Michelle Malkin, Esq., *Schwerin, Campbell & Barnard LLP, Seattle, Washington*

For the Respondent:

Anderson B. Scott, Esq., *Fisher & Phillips LLP, Atlanta, Georgia*

FINAL DECISION AND ORDER

This case arises under the employee protection provisions of the Surface Transportation Assistance Act (STAA) of 1982, as amended and recodified, 49 U.S.C.A. § 31105 (West 1997). Complainant Michael J. Stout alleges that his employer, Respondent Yellow Freight System, Inc., violated the STAA when it suspended him for two weeks because he resisted taking driving assignments on two occasions due to illness and fatigue. A Department of Labor Administrative Law Judge (ALJ) issued a Recommended Decision and Order in which he concluded that Stout had failed to sustain his initial burden of establishing the elements of a *prima facie* case because he had not effectively informed Yellow Freight that he was too ill and fatigued to drive safely. The ALJ's decision is before the Administrative Review Board pursuant to 29 C.F.R. § 1978.109(c)(1)'s automatic review procedures. We affirm the ALJ's Recommended Decision and Order.

STANDARD OF REVIEW

We have jurisdiction to decide this matter by authority of 49 U.S.C.A. § 31105(b)(2)(C) (West 1997) and 29 C.F.R. § 1978.109(c)(2002).

Under the STAA, the Administrative Review Board is bound by the factual findings of the ALJ if those findings are supported by substantial evidence on the record considered as a whole. 29 C.F.R. § 1978.109(c)(3); *BSP Transp., Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Castle Coal & Oil Co., Inc. v. Reich*, 55 F.3d 41, 44 (2d Cir. 1995). Substantial evidence is that which is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 21 (1st Cir. 1998) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

In reviewing the ALJ's conclusions of law, the Board, as the designee of the Secretary, acts with “all the powers [the Secretary] would have in making the initial decision” 5 U.S.C.A. § 557(b) (West 1996). *See also* 29 C.F.R. § 1978.109(b). Therefore, the Board reviews the ALJ's conclusions of law *de novo*. *Roadway Express, Inc. v. Dole*, 929 F.2d 1060, 1066 (5th Cir. 1991).

DECISION

We have reviewed the record and find that the ALJ's factual findings are supported by substantial evidence on the record as a whole and are therefore conclusive. 29 C.F.R. § 1978.109(c)(3). The record also supports the ALJ's thorough, well reasoned legal conclusions. Accordingly, we adopt and attach the ALJ's Recommended Decision and Order and **AFFIRM** the denial of Stout's complaint.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

U.S. Department of Labor

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Office of Administrative Law Judges
50 Fremont Street
Suite 2100
San Francisco, CA 94105



Date: DECEMBER 3, 1999

Case No. 1999-STA-00042

In the Matter of:

MICHAEL J. STOUT,

Complainant

v.

YELLOW FREIGHT SYSTEM, INC.,

Respondent.

Before: Edward C. Burch
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

Michael J. Stout (Complainant) filed a complaint with the Secretary of Labor dated April 9, 1999, alleging discrimination against Yellow Freight System, Inc. (Respondent) under the employee protection provisions of the Surface Transportation Assistance Act (STAA), 49 U.S.C. §31101 *et seq.* The Regional Administrator of the Occupational Safety and Health Administration issued his determination on June 18, 1999, for the Secretary of Labor. The Regional Administrator determined that Complainant failed to establish a *prima facie* case of discrimination under Section 405 of the STAA. Complainant filed a written objection to the Regional Administrator's determination on July 8, 1999. A hearing on the merits was held in Seattle, Washington, on August 24, 1999.

Findings of Fact and Conclusions of Law

Respondent, Yellow Freight System, Inc., is engaged in interstate trucking operations. Complainant was hired by Respondent in June of 1988 at the Portland, Oregon break-bulk and

was transferred to the Seattle, Washington break-bulk in January of 1997. (TR 9)¹ Complainant testified that he has been employed by Respondent primarily as a pick-up and delivery driver. (TR 9-10) Complainant's shift is from 4:30 p.m. to 1:00 a.m. Monday through Friday, but he often works longer depending upon the work load. (TR 10, 53-55) Complainant's hourly wage is \$18.96 per hour. (RX 3:2)

At the hearing, Complainant testified that he had been suffering from fatigue since he was transferred to the Seattle break-bulk in January of 1997. (TR 39) On September 15, 1998, Complainant was examined by Dr. John L. Brottem, a sleep deprivation specialist. (TR 40; CX 1:b-c) Dr. Brottem examined Complainant at the request of Dr. William Penn for problems falling asleep while driving his truck at work. (CX 1:b) Complainant informed Dr. Brottem that although he had not been in an accident, the close calls were beginning to worry him. Dr. Brottem stated that Complainant "undoubtedly has very severe sleep apnea and is in store for a major accident if he does not get treated soon. He is warned regarding this." (CX 1:b) In a letter to Dr. Penn, dated September 15, 1998, Dr. Brottem stated that Complainant is a "slam-dunk as far as sleep apnea is concerned." (CX 1:a)²

At the hearing, Complainant testified that on October 7, 1998, he dislocated his jaw³ and could not sleep because of the pain. (TR 45-46) Complainant testified that he did not report to work October 8 through October 12, 1998.⁴ (TR 87) Complainant was examined by Dr. Penn on October 12, 1998, for his jaw pain.⁵ (CX 2:a)

Complainant reported to work on both October 13, and October 14, 1998. Doug Abraham, the dock supervisor, testified that at the end of his shift on Wednesday, October 14, 1998, Complainant approached him and said that he was not feeling well and was going home. (TR 128) Mr. Abraham testified that he gave Complainant "the benefit of the doubt" and told him he could go home, but reminded him that he needed to give as much forewarning as possible

¹ The following abbreviations will be used: TR = transcript of the hearing on August 24, 1999; CX = Complainant's exhibits; and RX = Respondent's exhibits. At the hearing, Complainant's exhibits C1-10 and Respondent's exhibits R1-4 were admitted into evidence.

² On October 18, 1998, Complainant underwent a sleep study at Providence St. Peter Hospital. Dr. Brottem diagnosed very severe obstructive sleep apnea with severe fragmentation, as well as hypoxemia. Dr. Brottem also stated Complainant had very significant periodic limb movement disorder. (CX 4:e) On October 22, 1998, Dr. Brottem informed Complainant of the test results. (CX 4:a)

³ Complainant informed Dr. Penn that he was eating and when he opened his mouth it became stuck. He heard a loud pop when he forced his jaw to close. (CX 2:a)

⁴ Complainant did not report to work on October 8, October 9, and October 12, 1998, due to his jaw injury. October 10 and October 11, 1998, were his regular days off from work. (TR 87)

⁵ On April 20, 1999, Complainant was examined by Dr. Gary R. Feldman. Dr. Feldman noted Complainant had a multiple-year history of bilateral right and left TM joint clicking that had remained asymptomatic until September of 1998. Dr. Feldman's impression was long-standing bilateral internal derangement, which was currently improving. (CX 3:d)

when he was ill in the future. (TR 128) Mr. Abraham testified that employees at Yellow Freight are asked to call-in to take themselves out of service as soon as they anticipate they will need to leave work for any reason so that Yellow Freight can reschedule other workers. (TR 129)

Shift Commencing Thursday, October 15, 1998

Testimony of Michael Stout

On October 15, 1998, Complainant began work at 4:30 p.m. and was dispatched to Fritz Inc., a customer of Yellow Freight. (RX 3:3, 4:1) In a statement dated July 8, 1999, Complainant stated that at the beginning of his shift his jaw was hurting and he was suffering from fatigue due to lack of sleep. (RX 3:3) According to Complainant, Fritz had an unusually heavy amount of freight that evening, so he had to stay late in order to finish loading. (RX 4:1) Complainant returned to the terminal at 2:50 a.m., approximately 9 hours and 50 minutes into his shift. (TR 22; RX 3:3, 4:1) There were still two trailers left at Fritz that needed to be picked up, but Complainant thought the day shift would be able to pick up the trailers since it was such a heavy night. Complainant estimated that it would have taken him an additional hour and a half to pick up the trailers. (TR 23-24)

Complainant went to the dock supervisor, Doug Abraham, to inform him of the two remaining trailers at Fritz. (TR 22-23) Mr. Abraham told Complainant to go back out to Fritz and pick up the trailers. (TR 23-24) Complainant testified that he was surprised by Mr. Abraham's response because he felt it was unusual to be sent out after working ten hours. (TR 24) Complainant told Mr. Abraham that he had a headache, was ill, and was not well enough to drive.⁶ (TR 24-25) According to Complainant, Mr. Abraham became very forceful and belligerent and once again told him to go back out and pick up the trailers. (TR 25; RX 4:1) Complainant admits that he became angry and slammed his clipboard down on the edge of the supervisor's stand to emphasize his point. (TR 25-26) Complainant admits that he yelled at Mr. Abraham but contends this was done only after Mr. Abraham began yelling at him. (RX 3:3) Complainant also admits that he did not inform Mr. Abraham of his specific problems regarding his jaw injury and sleep apnea; however, he testified that he told Mr. Abraham at least twice during the conversation that he was too ill and tired to drive. (TR 26, 73) Complainant did not complete the dispatch that evening. After the conversation with Mr. Abraham, Complainant finished his paperwork and went home. (TR 26)

Testimony of Doug Abraham

Mr. Abraham testified that near the end of the Thursday, October 15, 1998, shift Complainant approached him and informed him there were trailers left at Fritz that needed to be

⁶ In a letter to OSHA, dated March 22, 1999, Complainant stated he felt that under the Department of Transportation rules he not only had a right to refuse his dispatch orders, but had a duty to refuse them if it was not safe for him to drive any longer. (RX 4:1)

brought in. (TR 131) According to Mr. Abraham, Complainant did not initially inform him that he was impaired. Mr. Abraham told Complainant that it was his job to get the trailers but Complainant told him that he was not going to do it because he had already worked a ten hour shift. (TR 131) Mr. Abraham once again told Complainant to go get the trailers. (TR 132) Complainant then told Mr. Abraham that he was sick, had a headache, and was going home. Mr. Abraham testified he did not believe that Complainant was sick because he had not given any indication through the evening that he was ill and he sensed a pattern developing since Complainant had gone home early the prior evening. (TR 132-33) Mr. Abraham stated that the more hostile and belligerent Complainant became, the less credibility he gave him. (TR 133) According to Mr. Abraham, when he again told Complainant to pick up the trailers Complainant used profanity and slammed his clipboard down. Mr. Abraham testified that he threatened Complainant with a warning letter and Complainant once again used profanity and then punched out on the time clock and walked away. (TR 134)

At the hearing, Mr. Abraham testified that if Complainant would have informed him at the outset of his shift that he was suffering from extreme fatigue and illness he would have probably asked him to go home and would have found a replacement. (TR 135) In addition, Mr. Abraham testified that in his experience trailers are never left over for the day shift to complete. (TR 156) On October 16, 1998, Doug Abraham issued Complainant a warning letter for insubordination and a warning letter for failure to follow a direct work order for the incident that occurred on the Thursday, October 15, 1998, shift. (CX 7:a-b)

Shift Commencing Friday, October 16, 1998

Testimony of Michael Stout

On October 16, 1998, Complainant began work at 4:30 p.m. Complainant returned to the terminal at 2:00 a.m., approximately 9 hours and 30 minutes into his shift. (TR 28) Complainant testified that when he went to the night dispatcher, John Averilla, to sign off on his paperwork he was told there was another dispatch. (TR 29) Complainant told Mr. Averilla that he was ill, had a headache, was extremely sleepy, and felt that it was a danger for him to get back into the truck. (TR 29) Mr. Averilla told Complainant to go see Mr. Abraham.

According to Complainant, Mr. Abraham told him to go pick up the last trailer or he would be terminated immediately. (TR 30) In response, Complainant stated that he was sick, had a headache, was sleepy, and could not go out again. Complainant testified that he did not inform anyone at Yellow Freight of his illness and fatigue until after the dispatch because he had already put in nearly ten hours and thought he was done for the night. Complainant testified that Mr. Abraham again yelled that he would need to do what he was told or he would be terminated. Complainant admitted that he got angry and yelled "I'm not going back out." (TR 31) Complainant testified that during the conversation he informed Mr. Abraham numerous times that he was too ill and tired to drive. Mr. Abraham gave Complainant a handwritten warning letter for failure to follow instructions. (TR 34)

Complainant testified that Max McMahan, the shop steward, entered the room during his conversation with Mr. Abraham. Complainant told Mr. McMahan that he was too sick, tired, and ill to go out and stated that it was his understanding that the Department of Transportation rules said he did not have to go out when he felt he would be a danger to the public. (TR 33) Mr. McMahan informed Complainant that there was a good possibility that Mr. Abraham could terminate him for refusing to obey the dispatch. Complainant stated he felt his job was in danger so he complied with the order and picked up the trailer. (TR 34)

At the hearing, attorney for Respondent asked Complainant why he returned to work for his shifts commencing on October 15 and October 16, 1998, after being warned by Dr. Brottem that he had very severe sleep apnea and was in store for a major accident. (TR 57-58) Complainant testified that Dr. Brottem never told him he definitely had sleep apnea, but only stated that there could be danger if he was not very careful. (TR 60) Complainant stated that he did not inform Respondent of his sleep apnea because he felt the diagnoses had not been confirmed. (TR 60) Further, Complainant admitted that he probably should have called in sick prior to the Friday, October 16, 1998, shift but he needed the money. (TR 74)

Testimony of Doug Abraham

Doug Abraham testified that on Friday, October 16, 1998, at about 8:30 p.m. he became aware of a stranded trailer that needed to be picked up from a customer. Mr. Abraham told the dispatcher, John Averilla, to notify the next driver that came in that there would be an extra pick up. (TR 137) When Complainant returned to the terminal he told Mr. Averilla that he would not take the dispatch, so Mr. Averilla sent Complainant to see Mr. Abraham. (TR 167-68)

Complainant told Mr. Abraham that he was not going to get the trailer, he had put in his ten hours, and he was going home. (TR 139) Mr. Abraham told Complainant that he had been dispatched, Complainant understood the rules, and he needed to finish his job. Mr. Abraham testified that they talked back and forth for a while but Complainant did not mention to him that he was sick or fatigued. (TR 139) Mr. Abraham then told Complainant that if he did not follow the dispatch order his actions would be accepted as a resignation. According to Mr. Abraham, Complainant used profanity and refused to get the trailer. (TR 140) Mr. Abraham testified that it was not until after the heated exchange that Complainant told him he was too sick to perform the dispatch. (TR 140) Mr. Abraham gave Complainant a handwritten warning letter for failure to follow instructions. (TR 141-42) Mr. Abraham testified that Complainant eventually finished the dispatch after Max McMahan discussed the situation with him. (TR 144)

At the hearing, Eric Stone, a dock driver for Respondent, testified that he witnessed the conversation between Complainant and Doug Abraham on the Friday, October 16, 1998, shift. (TR 93) Mr. Stone testified that Complainant told Mr. Abraham that he was going home but Mr. Abraham told him there was still work to be done. After a heated conversation, Complainant used foul language toward Mr. Abraham who then used foul language in return. (TR 95) According to Mr. Stone, it was not until after the foul language was used that Complainant

informed Mr. Abraham he was too ill and fatigued to continue driving. (TR 96)

At the hearing Max McMahan, the shop steward at Yellow Freight, testified that he witnessed the “heated conversation” between Doug Abraham and Complainant on the Friday, October 16, 1998, shift. (TR 104-5) According to Mr. McMahan, Mr. Abraham told Complainant to make the run, but Complainant refused. The conversation went back and forth. Complainant asked Mr. McMahan if Mr. Abraham could force him to take the run and Mr. McMahan responded that he could. (TR 105) According to Mr. McMahan, Complainant had not mentioned illness or fatigue at that point in the conversation. (TR 106) About ten minutes into the conversation Complainant told Mr. McMahan he did not feel well and Mr. McMahan told him that it was ultimately Complainant’s own decision whether or not to take the run. (TR 107) In addition, Mr. McMahan testified that normally after a ten hour shift an employee is able to go home unless it is a close-out night. Friday nights are typically close-out nights and the company can request that an employee put in extra time. (TR 108)

At the hearing, Gary Bolen, a dock worker/pick-up and delivery driver at Yellow Freight, testified that he observed Mr. Abraham and Complainant arguing on October 16, 1998. (TR 119-21) According to Mr. Bolen, Mr. Abraham asked him to witness the incident. (TR 121) Mr. Bolen testified that he first heard Complainant tell Mr. Abraham he was tired and then later told him he was feeling sick. (TR 122) Mr. Bolen testified that Complainant told Mr. Abraham three or four times that he was too ill or tired to get the trailer. (TR 124)

On October 19, 1998, Doug Abraham issued Complainant a letter of intent to suspend for seven days for failure to follow a direct work instruction and a letter of intent to suspend for an additional seven days for insubordination for the incidents that occurred on the Friday, October 16, 1998, shift. (CX 7:c-d) On November 30, 1998, Dan Hazard, General Operations Manager for Yellow Freight, issued a suspension letter confirming Complainant was suspended for fourteen days. (CX 8)

Complainant filed a complaint with the Secretary of Labor dated April 9, 1999, alleging discrimination against Respondent under the employee protection provisions of the STAA. The Regional Administrator of the Occupational Safety and Health Administration issued his determination on June 18, 1999, for the Secretary of Labor. The Regional Administrator found the evidence failed to establish that Complainant was engaged in protected activity. The Regional Administrator stated that “[w]hile 49 CFR §392.3 protects drivers from being forced to drive while they are so impaired through illness or fatigue, the driver must convey to his/her supervisor the extent of their impairment. Merely stating to them that ‘I have a headache . . . or I am ill and fatigue[d]’ is not sufficient.” (Sec’y Findings p. 4-5) The Regional Administrator concluded that absent protected activity, a *prima facie* allegation of discrimination under Section 405 of the STAA had not been established, and there was no reasonable cause to believe that Respondent was in violation. (Sec’y Findings p. 5) Complainant filed a written objection to the Regional Administrator’s determination on July 8, 1999.

Analysis

The employee protection provisions of the STAA provide in relevant part:

(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because . . .

(B) the employee refuses to operate a vehicle because —

(i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health.

(ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicles unsafe condition.

49 U.S.C. §31105(a)(1)(B). To qualify for protection under this provision, a complainant must also “have sought from the employer, and been unable to obtain, correction of the unsafe condition.” 49 U.S.C. §31105(a)(1)(B); *Johnson v. Roadway Express, Inc.*, 1999-STA-5 (ALJ July 21, 1999).

In order to establish a *prima facie* case under the STAA, the complainant must show by a preponderance of the evidence that: (1) he engaged in protected activity; (2) he was subjected to adverse action; and (3) the respondent was aware of the protected activity when it took the adverse action. Additionally, the complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. *Auman v. Inter Coastal Trucking*, 91-STA-32 (Sec’y July 24, 1992); *Osborn v. Cavalier Homes of Alabama, Inc.*, 89-STA-10 (Sec’y July 17, 1991). A respondent may rebut this *prima facie* showing by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. The complainant must then prove that the proffered reason was not the true reason for the adverse action and that the protected activity was the reason for the action. *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 506-508 (1993).

Prima Facie Case

Protected Activity

A refusal to drive because of illness or fatigue may constitute protected activity under the provisions of the STAA. Part 392 of Title 49 of the Code of Federal Regulations, Driving of Commercial Motor Vehicles, provides:

No driver shall operate a motor vehicle, and a motor carrier shall not require or permit a driver to operate a motor vehicle, while the driver’s ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him to begin or continue to operate the motor vehicle.

49 C.F.R. §392.3; *Byrd v. Consolidated Motor Freight*, 97-STA-9 (ARB May 5, 1998); *Brandt v. United Parcel Serv.*, 95-STA-26 (Sec’y Oct. 26, 1995); *Lorenz v. H & J Mfg. Serv.*, 92-STA-26 (ALJ Dec. 17, 1992), *aff’d* (Sec’y Apr. 7, 1993). A refusal to drive that is based upon the fatigue rule may qualify for protection under either the “reasonable apprehension” or “actual violation” provision of the STAA. *Turgeon v. Maine Beverage Container Serv., Inc.*, 93-STA-11 (Sec’y Nov. 30, 1993). Under the “reasonable apprehension” category, the employee’s refusal to drive must be based on an objectively reasonable belief that operation of the motor vehicle would pose a risk of serious injury to the employee or the public. *Yellow Freight Systems, Inc. v. Reich*, 38 R.3d 76, 81 (2d Cir. 1994). Under the “actual violation” category, a refusal to drive is protected only if the record establishes the employee’s driving of the commercial motor vehicle would have been in violation of a pertinent motor vehicle standard. *Id.* at 82.

In this case, I find that Complainant’s refusal to drive on October 15 and October 16, 1998, constitutes protected activity under both the “reasonable apprehension” and “actual violation” provisions of the STAA. On September 15, 1998, Dr. Brottem stated that Complainant “undoubtedly has very severe sleep apnea and is in store for a major accident if he does not get treated soon. He is warned regarding this.” Further, in a letter dated September 15, 1998, Dr. Brottem stated Complainant is a “slam-dunk as far as sleep apnea is concerned.” In addition, Complainant himself testified that he was too tired and ill to accept the extra dispatches at the end of his shifts. Based upon the above, I find that on both dates in question, Complainant should not have been driving and that Complainant knew he should not have been driving. Accordingly, I find that Complainant’s refusal to drive on both October 15 and October 16, 1998, was based upon an objectively reasonable belief that operation of his motor vehicle would pose a risk of serious injury to himself or the public. Further, I find that due to Complainant’s physical condition the operation of his motor vehicle would have been in actual violation of the STAA. As a result, I find that his refusal to drive constitutes protected activity.

Adverse Action

It is clear Respondent took adverse action against Complainant. Doug Abraham issued Complainant warning letters for insubordination and for failure to follow a direct work order as a result of the incident on October 15, 1998. In addition, Mr. Abraham issued Complainant a handwritten warning letter for failure to follow instructions, a letter of intent to suspend for seven days for failure to follow a direct work instruction, and a letter of intent to suspend for an additional seven days for insubordination for the incident that occurred on October 16, 1998. Complainant was ultimately suspended for fourteen days for the October 16, 1998, incident.

Employer’s Knowledge of the Protected Activity

The Secretary of Labor has held that when a driver refuses to work due to poor health, the driver has the burden of explaining to his employer that he is ill and that because of this condition he cannot drive without creating a danger to the public at large or himself. *Smith v. Specialized Transp. Serv.*, 91-STA-22 (Sec’y Apr. 30, 1992); *see also Lorenz*, 92-STA-26 at 9; *Perez v.*

Guthmiller Trucking Co., 87-STA-13 (Sec’y Dec. 7, 1988). It is not enough for the employee to simply state that he is not feeling well or that he is “sick and tired.” The comments must be explicit enough to convey to Respondent that the refusal to continue to drive was because the complainant’s ability to do so was impaired. *Smith*, 91-STA-22 at 4; *Lorenz*, 92-STA-26 at 9; *Perez*, 87-STA-13 at 25.

In this case, I am persuaded that if Respondent would have had knowledge of Complainant’s specific physical conditions, they would not have allowed him to drive. However, I find that Respondent did not have sufficient knowledge of the protected activity. Complainant did not explicitly convey to Respondent the extent of his impairment. Complainant himself admitted at the hearing that he did not inform Mr. Abraham of his jaw injury or sleep apnea. On both October 15 and October 16, 1998, Complainant only made general references to being ill and fatigued, rather than explicitly conveying the extent of his medical impairment and that his refusal to drive was because his ability to do so would result in a danger to himself or the public. As a result, I find that under *Smith* and *Lorenz* Complainant’s statements were insufficient to satisfy the communication requirement of the STAA.

In addition, I find that Mr. Abraham had reason to doubt the credibility of Complainant’s claims of illness and fatigue and conclude that Complainant was being insubordinate. First, on both the October 15 and October 16, 1998, shifts, Mr. Abraham testified that Complainant’s initial response to his direction to pick up the extra dispatches was that he had already put in his ten hour shift. Mr. Abraham testified that it was only after he rejected this assertion that Complainant mentioned that he was too ill or fatigued to complete the dispatches. Second, since both conversations were argumentative I find that it was reasonable for Mr. Abraham to have concluded that Complainant’s comments were made in the heat of anger or as a backlash and that Complainant was being insubordinate. Complainant yelled at Mr. Abraham, used profanity, and slammed his clipboard down during the conversations. Mr. Abraham himself testified that the more hostile and belligerent Complainant became, the less credibility he gave him. Third, I find that it was reasonable for Mr. Abraham to sense that a troubling pattern was developing in that Complainant had requested to go home before his dispatches were finished three nights in a row. Finally, I find that it was reasonable for Mr. Abraham to doubt Complainant’s credibility because of his failure to utilize the call-in procedure to take himself out of service. Although Complainant contends that he did not call in because he did not expect to be given an extra dispatch, according to Respondent, the drivers at Yellow Freight must call in to take themselves out of service even when they know of no other assignments that await them at the terminal. For the above reasons, I find that it was reasonable for Mr. Abraham to doubt the credibility of Complainant’s claims that he was too ill or fatigued to complete his dispatches.

Therefore, I find that Respondent did not have sufficient knowledge of the extent of Complainant’s medical impairment and that his refusal to drive was because his ability to do so would result in a danger to himself or the public. Accordingly, I find that Respondent was not aware of the protected activity and as a result Complainant has failed to establish a *prima facie* case of a violation of the employee protection provisions of the STAA.

Causal Connection

Where an employer does not have knowledge of the employee's protected conduct, it can not be causally established that the employer's decision to take adverse action was motivated by the employee's protected conduct. *Perez*, 87-STA-13 at 25. In this case, Respondent did not have actual knowledge of the extent of Complainant's medical impairment and that his refusal to drive was because his ability to do so would result in a danger to himself or the public. Therefore, I find that it has not been causally established that Respondent's decision to take adverse action against Complainant was motivated by Complainant's protected activity.

In conclusion, I find that Complainant has failed to establish a *prima facie* case of a violation of the employee protection provisions of the STAA.⁷

ORDER

It is recommended that the complaint of Michael J. Stout against the Yellow Freight System, Inc., under the Surface Transportation Assistance Act be dismissed, with prejudice.

EDWARD C. BURCH
Administrative Law Judge

San Francisco, CA

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978 (1996).

⁷ Considering I have concluded that Complainant has not established a *prima facie* case of a violation of the employee protection provisions of the STAA, it is not necessary to consider the doctrine of unclean hands and whether Complainant was outside the protection of the STAA because he was not qualified to perform his job due to his physical condition.